IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1635 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DCW LTD. & 1 - Petitioner(s)

Versus

UNION OF INDIA & 3 - Respondent(s)

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Appearance :
MR PARESH M DAVE for Petitioner(s) : 1 - 2.
MR JITENDRA MALKAN for Respondent(s) : 1,
MS AVANI S MEHTA for Respondent(s) : 1 - 4.
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 15/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.This petition, styled as a petition under Article 226 of the Constitution of India, has been preferred with the following prayers :

> “[A] That Your Lordships may be pleased to issue a Writ of Certiorari or any other appropriate writ, direction or order, quashing and setting aside OIA No. 9/2004/9 (KDL)/Commr(A) /Raj dated 9/1/2004 (Annexure “H”) with a direction to respondent Nos.3 and 4 herein to forthwith pay refund of Rs.41,48,176/- along with interest for the period of three months after 2nd January 2001 till the actual payment of the above amount at the rates that may be deemed fit by this Hon'ble Court;
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> [B] That Your Lordships may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate writ, direction or order, directing the respondent Nos.3 and 4 herein to forthwith pay to the petitioner company the amount of Rs.41,48,176/- along with interest for

the period of three months after 2nd January 2001 till the actual payment of the above amount at the rates that may be deemed fit by this Hon'ble Court;

[C] Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct the respondent Nos. 3 and 4 herein to forthwith pay the amount of Rs.41,48,176/- to the petitioner company;

[D] Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct the respondent Nos. 3 and 4 herein to forthwith pay interest at the rates specified under Section 27A of the Customs Act, 1962 during the aforesaid period;

[E] An ex-parte ad-interim relief in terms of Paras 9(C) & (D) above may kindly be granted;

[F] That Your Lordships may be

pleased to pass appropriate Orders thereby dispensing with filing of certified copy of OIA No. 9/2004/9(KDL)/Commr(A)/Raj dated 9/1/2004 (Annexure “H”);

[G] Any other further relief as may be deemed fit in the facts and circumstances of the case may also please be granted.”

2.The petitioner is a Limited Company, engaged in the business of manufacture of Soda Ash at its factory located at Dhangadhra in the State of Gujarat. In 1990, the petitioner Company imported plant and equipment known as Steam Tube Dryer (machinery / plant) from Germany for upgrading its existing plant. A dispute arose between the petitioner and the Customs Department as to the correct classification of the machinery and the petitioner approached this Court by way of Special Civil Application No.4462 of 1990. As directed by this Court,

while disposing of the petition, adjudication proceedings were conducted by Commissioner of Customs, Kandla, followed by an order in original dated 15th May 1991. Thereafter, two rounds of litigations upto level of the Appellate Tribunal ensued between the parties and ultimately, the Tribunal upheld the claim of the petitioner in part. As a consequence, on 2nd January 2001, the petitioner computed the total assessable value of the imported plant, and after deducting the amounts paid, worked out a refund to the tune of Rs.41,48,176/- as due to the petitioner from respondent Department.

3.It is the case of the petitioner that the aforesaid amount of Rs.41,48,176/- is comprised of two basic components, namely, Rs.17,50,000/-, which was deposited from time to time as directed by this Court during pendency of various proceedings, and

Rs.23,98,176/- which came to be paid by way of encashment of one of the bank guarantees, furnished by the petitioner as per the directions of this Court.

4.It is not necessary to set out the details of various proceedings before the adjudicating authority, the Appellate Tribunal as well as this Court, there being no dispute on this count. A summary of the total amount of customs duty paid by the petitioner and the basis for working out the excess amount paid and claimed as refundable is as under:

“Total amount of Customs duty determined as per CEGAT order	Rs.1,50,66,000
Add : Fine imposed	Rs. 5,00,000
Total	Rs.1,55,66,000
Duty paid during the financial year 1990-91	Rs.1,09,64,176
Duty paid by invocation of Bank Guarantee on 20/09/1994	Rs. 70,00,000
Amount deposited with High	

Court on 07/08/1992 & 20/01/1993	Rs. 17,50,000

TOTAL AMOUNT PAID	Rs.1,97,14,176
Amount Excess Paid	Rs. 41,48,176”

5.The petitioner's refund claim was rejected by the Deputy Commissioner of Customs vide order dated 17/8/2001. In relation to the amount of Rs.17,50,000/-, the finding was that “The question of sanctioning refund of that amount does not arise” because the amount “deposited in the High Court of Gujarat, Ahmedabad is not credited under the Customs Head.” In respect of the balance claim of Rs.23,98,178/-, the Deputy Commissioner held that, even if the said amount is sanctionable as refund due to the petitioner, the same is liable to be credited to Consumer Welfare Fund by invoking the principle of unjust enrichment as the petitioner had failed to establish that incidence of duty had not been passed to any other person.

6.The petitioner carried the matter in appeal. Vide order dated 9/1/2004, the Commissioner (Appeals) held that (a) refund of Rs.17,50,000/- is to be allowed subject to verification of records of Customs or the records of Gujarat High Court Registry to the effect that the said amount had been transferred under the Head of Customs duty; (b) the rejection of refund claim of Rs.23,98,176/- was confirmed.

7.Mr.Paresh Dave, the learned advocate appearing on behalf of the petitioner, assailed the aforesaid order of Commissioner (Appeals) in relation to both the findings. Insofar as the amount of Rs.17,50,000/- is concerned, the submission was that the amount had been deposited as directed by this Court with the Registry of this Court and pursuant to directions issued by this Court, the same had

been withdrawn by the learned counsel appearing on behalf of the Customs Department. Therefore, the petitioner could not be directed to establish as to where the amount was credited by the Customs Department after having received the same through its counsel.

7.1 In relation to the second amount, namely, Rs.23,98,176/-, the submission was that the same was never paid as duty, the same having been recovered by encashment of the bank guarantee. Therefore, the amount retained the characteristic of bank guarantee or a security and once the petitioner succeeded ultimately in the appellate forum, even if the amount had been realized by way of encashment of bank guarantee in between, the doctrine of unjust enrichment could not be pressed into service by the Department, there being no payment of duty as such. Alternatively, the submission was that the payment of the said sum, even if it

was treated as payment of duty, was on account of importation of capital goods. The said goods, namely, plant, was never sold by the petitioner and was utilized as such for manufacturing of final products by the petitioner. Therefore, there was no question of passing on the incidence of duty paid for importing such plant, and the authorities were in error in equating the same to inputs or raw materials for the purposes of laying onus at the door-step of the petitioner.

8.In support of the propositions, he placed reliance on the following decisions:

(i)Oswal Agro Mills Ltd. v. Asstt. Collector of Central Excise, Ludhiana, 1994 [70] ELT 48 (SC);

(ii)Union of India v. Grasim Industries Ltd., 2005 [183] ELT 12 (Rajasthan);

(iii)Somaiya Organics v. State of Uttar Pradesh,

2001 [130] ELT 3 (SC);

(iv)Union of India v. Solar Pesticide Pvt. Ltd., 2000 [116] ELT 401 (SC);

(v)Collector of Customs, Madras v. Indo-Swiss Synthetics Gem Mfg. Co. Ltd., 2003 [162] ELT 121 (Mad.).

9.He also relied on decisions rendered by this Court in the case of Parle International Ltd. v. Union of India, [2001] 127 ELT 329 (Gujarat) and Tata SSL Limited v. Union of India, [2002] 140 ELT 338 (Gujarat), in support of the contention that the petitioner must also be held to be entitled to interest on the refund that may be held to be available to the petitioner.

10.Ms.Avni S.Mehta, the learned counsel appearing on behalf of the respondents relied on the orders of the Deputy Commissioner and the Commissioner (Appeals). She also submitted

that necessary directions, in relation to the amount of Rs.17,50,000/-, may be issued to the authorities for verification as to whether the amount had been credited under the Head of Customs duty or not, because she had no instructions on this count.

11. Insofar as the first amount is concerned, namely, Rs.17,50,000/-, the case of the Department is limited to the aspect as to whether the same has been credited under the Head Customs duty or not after the amount was received from the Registry of the High Court. Though in the order in original, at one stage, the adjudicating authority sought to place reliance on the entries made by the petitioner by showing the sum as outstanding deposit in its balance sheets for different years, in light of the finding and direction of Commissioner (Appeals) and the facts which have come on record, it is no longer in dispute that

the said amount was never paid as duty by the petitioner.

12.On 9/2/2004, when the petition came up for admission, this Court passed the following interim order :

> “2. It will be open to the petitioners to make inquiries with the Registry to find out whether the following amounts deposited in the Registry of this Court as evidenced in the receipts at page Nos. 44 and 45 of the paper book, have been paid over by the Registry to the Customs Department:-
>
> | Sr. No. | Receipt No. | Date | Amount Rs. | Proceedings |
> |---|---|---|---|---|
> | 1. | 2423 | 20.1.'93 | Rs.12,50,000/- | CA No.1796/92 in SCA No.4462/90. |
> | 2. | 2273 | 20.8.'92 | Rs. 5,00,000/- | MCA No.1031/92 in CA No.836/92 in SCA No.4462/90. |
>
> It is made clear that nothing is brought to the Court's notice whether any Court order was sought for such payment to be made by the Registry to the Customs Department.
>
> After the said inquiries if it is found that

the aforesaid amounts have been paid over by the Registry to the Customs Department, it will be open to the petitioners to move this Court with an appropriate application."

13.Pursuant to the aforesaid order, the petitioner preferred Civil Application No.2967 of 2004 wherein the petitioner has categorically stated as under :

"[2] The petitioners have caused inquiries with the Registry of this Hon'ble Court and now the inquiries reveal that the amount of Rs.17,50,000/- was paid over to the Customs Department in pursuance of an Order dated 10/8/1993 passed in C.A. No.1559 of 1993 in Special C.A. No.4462 of 1990. A copy of this above Order dated 10/8/1993 passed by this Hon'ble Court in the above referred Civil Application filed by the Union of India is enclosed and marked as Annexure II.

It is recorded in para 9 of the above referred order that the petitioners

herein had deposited amount of Rs.17,50,000/-, and para 14 of the order also shows that the applicant Union of India was allowed liberty to withdraw the said amount.

The petitioners have also learnt from the Registry of this Hon'ble court that a note for withdrawal of the above amount was filed by the Union of India through their Addl. Standing Counsel Shri J.D.Ajmera on 26/8/1993, and the Nazar Branch has issued a cheque in favour of the Union of India on 18/12/1993.

Thus, it is clear that the amount of Rs.17,50,000/- deposited by the present petitioners in the above referred proceedings of Special C.A. No.4462 of 1990 has been paid over to the respondents herein and this payment was made by the Registry in pursuance of the Order dated 10/8/1993 passed by this Hon'ble Court in the Civil Application filed by the Union of India.”

14.In the aforesaid circumstances, the respondent

Department cannot insist and expect the petitioner to show and establish that the amount received by the Additional Standing Counsel of the Department vide cheque issued in favour of the Union of India on 18/12/1993 has been credited under the appropriate head. The record is with the Department. It is for the Department to verify as to under which head it has credited the amount. The petitioner does not have access to the said record and cannot be expected to establish the entries made therein.

15.Even if, for the sake of argument, it could be presumed that the amount has not been credited in the proper head, the petitioner cannot be penalized for the same. The petitioner is not in charge of making the appropriate entries, nor is in control of the account heads of the respondent Department. Therefore, the insistence that unless and until the petitioner

establishes that the amount has been credited under the Head of “Customs duty”, no refund can be granted, is, to say the least, casting an impossible burden on the petitioner. However, on facts, once the record of the Registry of this Court shows that the counsel of the Department has collected the cheque, nothing further survives and the petitioner must be granted the refund, which the authorities accept, in principle, the entitlement of the petitioner.

16. Taking up the principal contention raised on behalf of the petitioner qua the balance amount, it proceeds on a basic fallacy. There can be no dispute that a bank guarantee which subsists and operates as a bank guarantee, cannot be equated with duty paid. But, a bank guarantee which has been encashed, and rightfully encashed, cannot thereafter be treated as a bank guarantee which continues as

such so as to seek parity of the duty so paid with a subsisting bank guarantee. The judgement in case of Oswal Agro Mills Ltd. (supra), on which great emphasis was placed on behalf of the petitioner, does not lay down the proposition that the petitioner is advancing before the Court. The position in law is well settled that any judgement of the Apex Court or for that matter, any Court, has to be read, and the ratio thereof understood, in the context of the factual matrix in which the controversy arose before the concerned Court. The reliance on paragraphs No.9 and 10 of the judgement in case of Oswal Agro Mills Ltd. (supra), divorced from the factual matrix in which the Apex Court was called upon to decide the controversy, might at the first blush, convey an impression that the petitioner wants to convey. However, when one reads the basic facts and the issue which was raised before the Apex Court, it becomes abundantly, clear that what is observed

in paragraphs No.9 and 10 cannot be termed to be absolute proposition, regardless of the distinction between a bank guarantee which is subsisting, and one where the same has been encashed and the amount appropriated towards duty.

17.In the case before the Apex Court, the assessee had applied for refund of the 50% of the amount which was paid by the assessee to the excise authorities accompanied by bank guarantee furnished for the balance 50%, and the claim of refund was restricted to the amount which was actually paid with a prayer to release the bank guarantee deposited with the excise authorities. The High Court of Punjab and Haryana issued a direction to dispose of the claim within one month with further direction to the assessee concerned to have the bank guarantee extended till final disposal of the claim of refund. Against the aforesaid

direction, the assessee approached the Apex Court and succeeded vide order dated 26/11/1993. The Excise Department sought review of the same and in review proceedings, the Apex Court took note of the fact that the encashment of bank guarantee on 17th November 1993 was not warranted in any manner whatsoever in absence of any valid order in favour of the Department and hence, the Apex Court directed the excise authorities to repay the amount so collected by encashment of bank guarantee. The Apex Court also noted that the direction issued by the High Court to extend the bank guarantee could not have been issued by the High Court as the only prayer before the High Court was seeking release of the bank guarantee already furnished. It is in aforesaid backdrop of facts and circumstances that the Apex Court posed the question and answered the same: namely whether furnishing of a bank guarantee for all or part of the disputed excise duty

payment pursuant to an order of the court is equivalent to payment of amount of excise duty, by stating that it was not so. When one reads the entire paragraph, namely paragraph No.10, it is apparent that the same is in context of a continuing bank guarantee and not in case of a bank guarantee which is validly encashed in accordance with law. It is in this context that the Apex Court has held that the provisions of section 11B of the Central Excise Act, 1944 cannot be invoked and there could be no question of refund in absence of any payment. This becomes abundantly clear when one reads paragraph No.11 of the judgement.

18.Reliance on the decision in case of Union of India v. Grasim Industries Ltd. cannot carry the case of the petitioner any further because, with due respect to the Hon'ble High Court, they have read the decision of the Apex Court in case of Oswal Agro Mills to mean that in all

cases of bank guarantee, whether it is subsisting as bank guarantee or is already encashed, it would amount to non-payment of duty. This Court expresses its respectful disagreement with the view expressed by the Hon'ble High Court of Rajasthan while dismissing the reference application of the revenue.

19. Decision in case of Somaiya Organics (supra) again does not throw any further light. The Court was primarily called upon to decide as to whether the levy of vend fee on industrial alcohol in the form of State Excise Duty was valid or not. It is in that context that, in paragraph No.33, the Apex Court held that where the State is held not to be entitled to collect or realise the vend fee after the specified date, it could not be allowed to invoke the bank guarantee and realise the amount of vend fee. In fact, this observation supports the

view that the Court has taken, namely, the bank guarantee must subsist as bank guarantee, only then the question of invoking the same can arise. If it has already been encashed, there could be no question of invoking the same.

20.Therefore, the submission on behalf of the petitioner that bank guarantee has to be treated as only a security towards realization of the dues and cannot be treated as payment of duty, even if the guarantee is invoked and encashed, when the petitioner ultimately succeeds, resulting in non-application of doctrine of unjust enrichment, does not merit acceptance. Once the bank guarantee has been invoked and encashed, the amount partakes the character of duty paid and thereafter, even when an assessee succeeds ultimately, the claim of refund will be for refund of duty paid. The claimant has to comply with the conditions of the provisions pertaining to refund, namely,

Section 11B of the Central Excise Act, 1944 and Section 27 of the Customs Act, 1962.

21.Alternative claim that in case of capital goods, there could be no requirement of establishing that the incidence of duty has been passed on also proceeds on an erroneous premise. In the first instance, the contention that the user of capital goods for the manufacture of final products cannot be equated with user of inputs is true only to a certain extent. However, when the issue is in relation to whether the duty paid on such capital goods and the duty paid on inputs is required to be refunded, the requirement of the provision, namely, that the incidence of such duty has not been passed on, cannot be read so as to mean it is applicable only to inputs and not to capital goods. It is not in dispute that such capital goods, namely, the plant and machinery are put to use for the purposes of manufacturing the

final products. Hence, for the purposes of arriving at the cost of such manufactured products, the principles of accounting also would require that the normal wear and tear, in commercial word known as “depreciation”, would go in as a component of the cost without which true profits could not be ascertained. This would stand on the same footing as the cost of raw materials which would go in as a component for arriving at the correct cost of manufactured products. There could be no distinction between the two. The only difference being that in case of input, the entire cost of the material consumed would be taken while reckoning the manufacturing cost, while in case of the plant and machinery, a proportionate cost would be taken for reckoning, in the form of wear and tear or depreciation, qua the said plant and machinery, the cost of the final product.

22.The word “profits” has to be understood in its natural and proper sense – in a sense no commercial man would misunderstand. The profits have to be real profits ascertained on ordinary principles of commercial trading and commercial accounting. Normal depreciation is considered a legitimate deduction in determining the true profits. Section 205 (1) of the Companies Act, 1956 provides that no dividend shall be declared or paid except out of profits of the year, and such profits have to be arrived at after providing for depreciation in accordance with the provisions of Sub Section (2) of Section 205 of the Companies Act. Therefore, even statutorily the petitioner is required to provide for depreciation in value of capital goods before it makes up its Profit & Loss Account. The Payment of Bonus Act, 1965 lays down by way of Section 4 **(b)** that depreciation provided under Section 205 (2) of the Companies Act be added

back to the net figure of Profit & Loss Account, because under Section 6 of the Payment of Bonus Act depreciation worked out under Section 32 of the Income Tax Act, 1961 is required to be deducted while arriving at the available surplus/allocable surplus. The underlying commercial principle which has been statutorily given recognition is that against the current year's receipts the true cost which has been incurred for earning such receipts has to be charged.

23.The judgement of the Apex Court in the case of Union of India v. Solar Pesticides Pvt. Ltd. (supra) does not lay down any contrary proposition. Merely because the Court was called upon to decide the controversy in case of raw material, it cannot be contended therefrom that the principle laid down therein would not be applicable in case of capital goods or plant and machinery. The Apex Court

has explained the use of the words “incidence of such duty” in section 27(1) of the Customs Act as under:

> “The use of the words “incidence of such duty...” is significant. The words “incidence of such duty” mean the burden of duty. Section 27(1) of the Act talks of the incidence of duty being passed on and not the duty as such being passed on to another person. To put it differently, the expression “incidence of such duty” in relation to its being passed on to another person would take it within its ambit not only the passing of the duty directly to another person but also cases where it is passed on indirectly.” (emphasis supplied).

24. Therefore, all cases where the “incidence of duty” has been passed on indirectly have to be considered within the parameters of section

27(1) of the Customs Act.

25.During the course of hearing, it was submitted on behalf of the petitioner that even if such an incidence of duty might form part of the cost price, unless and until it goes in as a part of the sale price, the doctrine of unjust enrichment cannot be invoked against the petitioner. This contention is based on the plea that the sale price which existed prior to putting the plant and machinery to use continued in relation to the manufactured products after the plant and machinery was put to use and therefore, in absence of any difference in the sale price at different points of time, a presumption should be raised that “incidence of duty” had not been passed on. The entire premise on which the submission is built is fallacious. In the first instance, it is the case of petitioner itself, that it had imported the plant in question so as to

replace and upgrade its existing plant and machinery. This would indicate that the cost of user of the old plant and machinery was such that a particular sale price had to be fixed. As against that, when new plant and machinery are installed and put to use, the manufacturing cost is bound to come down, which would leave enough margin to the manufacturer to retain the sale price at the same level. This could be only one instance why the sale price has remained constant. There could be various other factors, and such factors are within the knowledge of the petitioner. The petitioner is, therefore, duty bound to place on record the relevant material in this regard and discharge the onus which has been cast on the person making a claim to establish that the “incidence of duty” has not been passed on.

26.In support of the last proposition that the aforesaid decision in case of Solar Pesticides

Pvt. Ltd. of the Apex Court has to be read and understood in relation to capital goods as canvassed by the petitioner, reliance was placed on Madras High Court decision in case of Collector of Customs v. Indo-Swiss Synthetic Gem Mfg. Co. Ltd. (supra). Inviting attention to paragraphs No.28, 29 and 30 of the judgement, it was submitted that the Madras High Court had held that imported Silica crucibles captively used in manufacture of synthetic gems as refractory goods and not consumed in the process of manufacture, could not be treated as having been sold, as imported, to the customers or buyers, and as such, there could be no question of passing on the incidence of duty paid on such crucibles. This Court is in respectful disagreement with the opinion expressed by the High Court of Madras for the reasons already stated hereinbefore. Suffice it to state that the cost of the said crucibles would always be

taken into consideration while arriving at the cost of manufactured product, and as a consequence, the sale price.

27.There is one more aspect of the matter. It was submitted that due to various reasons, sale price may be fixed so that sale price might be less than the cost price, resulting in loss. The contention that merely because the sale price might be such that, due to market factors, an assessee may incur losses would not necessarily reflect that the incidence of duty has not been passed on. May be, in a given case, only a proportionate part may be passed on in such circumstance. Ultimately, it would be a question of fact and evidence will have to be led in this context. In the case of the petitioner, both the adjudicating authority and the appellate authority have come to the conclusion that the petitioner has not been able to establish that incidence of duty had

not been passed on. This is a finding of fact and it is not possible for this Court in these proceedings to take a different view of the matter.

28.In principle, the contention that in case of capital goods, the incidence of duty can never be passed on, cannot be accepted for the reasons mentioned hereinbefore.

29.In the circumstances, insofar as the claim of the petitioner regarding balance amount of Rs.23,98,176/- is concerned, it is not possible to find any infirmity in the impugned order of Commissioner (Appeals).

30.The petition is, therefore, partly allowed to the extent of claim of Rs.17,50,000/-, and rejected insofar as the claim of Rs.23,98,176/- is concerned. The amount of Rs.17,50,000/- to be refunded by the respondent authorities

within a period of twelve weeks from today. The claim as to interest cannot be accepted for the simple reason that the principal claim having been rejected in absence of any entitlement to refund of Rs.23,98,176/-, there would be no question of granting any interest.

31.Rule made absolute to the aforesaid extent. The petition stands partly allowed accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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